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Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-813
73-821

EDWARD V. HANRAHAN, *et al.*,
Petitioners,

v. No. 73-821

IBERIA HAMPTON, Administratrix on behalf of the Estate of Fred A. Hampton, Deceased, *et al.*,
Respondents,

AND

CITY OF CHICAGO, *et al.*,
Petitioners,

v. No. 73-813

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Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is not yet reported. The decision is reprinted as Appendix "B" to the Petition of the City of Chicago, et al., and as Appendix "A" to the Petition of Hanrahan, et al.

The decision of the United States District Court is reported at 339 F. Supp. 695 (N.D.

Ill. 1972). This decision is reprinted as Appendix "B" to the Petition of Hanrahan, et al., and as Appeniix "A" to the Petition of the City of Chicago, et al.

JURISDICTION

Respondents accept the statements of all Petitioners concerning the Jurisdiction of this Court.

QUESTIONS PRESENTED

I Whether the Court of Appeals properly reinstated Civil Rights causes of action against Petitioners Hanrahan and Jalovec where the complaints allege that these State's Attorneys engaged in illegal conduct, clearly outside the scope of their office, by planning and conducting a violent raid intended to cause death and injury to Respondents and by participating in subsequent conspiracies to conceal the true nature of their illegal acts.

II Whether the Court of Appeals properly reinstated causes of action against Petitioners Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, Sadunas, Meltreger, Sorosky, Hanrahan and Jalovec where Respondents set forth a network of specific facts which allege that each Petitioner engaged in heinous acts in furtherance of an extensive conspiracy to cause the false arrest and imprisonment of the survivors of the illegal raid, the institution of unfounded prosecutions and the concealment of the truth from the public, in violation of the statutory and constitutional rights of the Respondents.

III Whether the Court of Appeals properly recognized that state law could be invoked by Respondent Brewer, who, in her diversity

jurisdiction claims, pleaded violations of Illinois Tort Law for the willful and wanton misconduct of the Petitioners, carried out in bad faith, consisting of assault and battery, false imprisonment and malicious prosecution.

STATUTES INVOLVED

SMITH HURD ILLINOIS ANNOTATED STATUTES

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT

Part 2. Immunity of public employees
S.H.A. ch. 85, §§2-109, 2-201-2, 2-208.

§ 2—109. Acts or omissions

A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable. 1965, Aug. 13, Laws 1965, p. 2983, § 2-109.

§ 2—201. Determination of policy or exercise of discretion

Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused. 1965, Aug. 13, Laws 1965, p. 2983, § 2-201.

§ 2—202. Execution or enforcement of law

A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton negligence. 1965, Aug. 13, Laws 1965, p. 2983, § 2-202.

§ 2—208. Institution or prosecution of judicial or administrative proceeding

A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, unless he acts maliciously and without probable cause. 1965, Aug. 13, Laws 1965, p. 2983, § 2-208.

ATTORNEY GENERAL AND STATE'S ATTORNEYS
Section 5. Duties of State's Attorneys S.H.A. ch. 14, §5.

§ 5. Duties of state's attorney

The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

(2) To prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county, or to any school district or road district in his county; also, to prosecute all suits in his county against railroad or transportation companies, which may be prosecuted in the name of the People of the State of Illinois.

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

(5) To attend the examination of all persons brought before any judge on habeas corpus, when the prosecution is in his county.

(6) To attend before judges and prosecute charges of felony or misdemeanor, for which the offender is required to be recognized to appear before the circuit court, when in his power so to do.

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

(8) To assist the attorney general whenever it may be necessary, and in cases of appeal from his county to the Supreme Court, to which it is the duty of the attorney general to attend, he shall furnish the attorney general at least 10 days before such is due to be filed, a manuscript of a proposed statement, brief and argument to be printed and filed on behalf of the people, prepared in accordance with the rules of the Supreme Court. However, if such brief, argument or other document is due to be filed by law or order of court within this 10 day period, then the State's attorney shall furnish such as soon as may be reasonable.

(9) To pay all moneys received by him in trust, without delay, to the officer who by law is entitled to the custody thereof.

(10) To perform such other and further duties as may, from time to time, be enjoined on him by law.

(11) To appear in all proceedings by collectors of taxes against delinquent taxpayers for judgments to sell real estate, and see that all the necessary preliminary steps have been legally taken to make the judgment legal and binding.

STATEMENT OF THE CASE

This case arises out of the violent and allegedly illegal predawn raid at the home of Fred Hampton in Chicago, Illinois on December 4, 1969, the subsequent illegal actions surrounding the unfounded imprisonment and prosecution of surviving occupants of Hampton's apartment, and the extensive official actions taken to conceal and distort the flagrantly illegal nature of Petitioners' own wrongdoings during and after the raid. All of these actions were part of a number of specific but far reaching conspiracies to deprive Respondents of their constitutional and statutory rights because of their race and political beliefs, specifically their membership in the Black Panther Party. During the raid, Fred Hampton and Mark Clark were killed by police gunshots. Others were seriously wounded.

The Plaintiff-Respondents are Iberia Hampton, Administratrix of the estate of her son, Fred A. Hampton, deceased; Fannie Mae Clark, Administratrix of the estate of her son, Mark Clark, deceased; Verlina Brewer, by her next friend, William R. Brewer; Deborah Johnson; Ronald Satchel, by his next friend, Clara Bridges; Harold Bell; Blair Anderson, by his next friend, Benjamin Hester; Brenda Harris; and Louis Truelock.

Four separate complaints were filed in which Respondents claimed actual and punitive damages under the Federal Civil Rights Acts (42 U.S.C. §§1981, 1983, 1985, 1986, 1988) and under Illinois law (Illinois Rev. Stat. Ch. 85, §§1-101 et seq.). The District Court consolidated the four cases.

The defendants named in the complaints were: the fourteen police officers, assigned to the State's Attorney's office, who actually conducted the raid;[1] Edward V. Hanrahan, former State's Attorney of Cook County; Richard S. Jalovec and Sheldon Sorosky, former Assistant State's Attorneys; James Meltreger, Assistant State's Attorney; John Mulchrone, Harry Ervanian, John Meade, Robert Kukowinski, David Purtell, John Sadunas, and Charles Koludrovic, members of the Chicago Police Department's Internal Inspections Division (IID) and Crime Laboratory; Richard J. Daley, Mayor of Chicago; James B. Conlisk, Superintendent, Chicago Police Department; the City of Chicago and Cook County, employers of the above defendants.

Motions to dismiss were filed by all defendants. The District Court found the allegations plainly sufficient to state claims against the fourteen State's Attorney police who conducted the raid. Final judgment was entered dismissing all claims against the remaining fifteen defendants.

The United States Court of Appeals for the Seventh Circuit substantially reversed the District Court's holdings. It reversed and remanded as to defendants Hanrahan and Jalovec, as well as to defendants Sorosky, Meltreger, and the seven IID and Crime Laboratory officers. Circuit Judge Stevens stated that, "[t]he district court erred in holding that the immunity doctrine requires

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[1] In their Petition for Certiorari, Petitioners Hanarahan, et al. incorrectly stated that only seven of these fourteen officers were named as defendants.

dismissal, without trial, of plaintiffs' charges against defendants Hanrahan and Jalovec."[2] The allegations against Hanrahan and Jalovec were held sufficient, under the Federal Civil Rights Acts, to withstand a motion to dismiss. In order to determine the liability of the prosecutorial defendants, the Seventh Circuit required a factual examination as to whether their alleged wrongdoings were outside the scope of the authority of state's attorneys.

The Court of Appeals further held that the District Court incorrectly entered a final judgment disposing of the conspiracy claims against defendants Sorosky, Meltreger, and the IID and Crime Laboratory officials. As with Hanrahan and Jalovec, the issues involved were found to require resolution by the trier of fact. The Court held that, "if some [defendants] are in fact liable, it would be unjust to exonerate all before trial, or even discovery, has commenced."[3]

In addition, the Seventh Circuit upheld state tort claims pleaded by Respondent Brewer, a Michigan resident, against the defendants City and County in her complaint predicated on diversity jurisdiction. The opinion stated that, "[T]he Illinois statute does not immunize municipal corporations from liability

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[2] The Court of Appeals opinion is reprinted in the appendix to the Petition for Certiorari of Hanrahan, et al. (Hereinafter, Pet. followed by the designated appendix page number), e.g., Pet. 8a.

[3] Pet. 9a

if their agents are guilty of willful and wanton misconduct. The allegations in the Brewer complaint against the City of Chicago and Cook County are therefore sufficient."[4] The District Court's dismissal of all other counts by remaining plaintiffs against the City and County, and of all counts against defendants Daley and Conlisk was affirmed by the Court of Appeals.

The Petitioners here are: Hanrahan and Jalovec; Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Sadunas, Koludrovic, Sorosky, and Meltreger; and the City of Chicago.[5]

Motions to stay the mandate of the Seventh Circuit were made by Petitioners and denied. All remaining causes of action were remanded to the Trial Court and discovery proceedings are presently underway.

A. Conduct Of Petitioners Hanrahan And Jalovec

1. Prior To and During The Raid

As characterized by Circuit Judge Stevens, the, "[p]laintiffs allege that fourteen Chicago police officers raided an apartment at 2337 West Monroe Street at 4:15 A.M. on December 4, 1969, for the purpose of killing Mark Clark and Fred Hampton and punishing seven other residents of the apartment because they were Black and had exercised their First

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[4] Pet. 11a

[5] The County did not join in these Certiorari proceedings.

Amendment rights as members of the Black Panther Party."[6] Petitioners Hanrahan and Jalovec, along with these fourteen officers, met and planned this raid as part of an overall conspiracy to deprive Respondents of their constitutional and statutory rights and to discriminate against them because of their race and political beliefs.[7] The complaints state that: At a predawn hour when defendants knew the Hampton apartment would be occupied, fourteen heavily armed police officers, on special assignment to the State's Attorney's office, raided those premises.[8] Established procedures for subduing occupants during a search, such as the use of tear gas,were ignored.[9] Instead, upon entry and without provocation, the police used automatic machine

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[6] Pet. 1a-2a

[7] All references to the complaints, which are reprinted in the appendix to this brief, are cited as follows: H 1-15 refer to the pages of Respondent Hampton's complaint; C 16-24 refer to the pages of Respondent Clark's complaint; B 25-66 refer to the pages of Respondent Brewer's complaint; J 67-134 refer to the pages of Respondent Johnson's complaint, e.g., Liability predicated upon 42 USC §§ 1983, 1985;H 9-¶33; C 23-¶19; B 37-¶45; J 86-¶52.

[8] B 36-¶43; J 82-¶50

[9] Ibid.

guns, carbines, pistols, and shotguns to fire massive amounts of ammunition into Hampton's bedroom, as well as into the general living quarters of the apartment.[10] Hanrahan, Jalovec, and others did willfully, maliciously, and with specific intent plan these acts which involved the use of deadly and excessive force.[11] As a direct and proximate result of the use of this deadly and excessive force, two young men--Black Panther Party Chairman Fred Hampton and Mark Clark--were killed.[12] Hampton's bullet-riddled body was dragged from his bed to an adjoining room without knowledge of whether he was dead or alive.[13] Four additional plaintiffs were greviously wounded by police gunfire.[14] All seven surviving plaintiffs, including a woman who was eight months pregnant, were verbally and physically abused and subject to illegal arrest.[15] Before leaving, the raiding party ransacked the premises, stole and damaged personal property, and spoliated evidence of their own illegal acts.[16]

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[10] H 5-¶¶13-16; C 21-¶12; B 32-¶27; J 76-¶32

[11] H 6-¶20; C 23-¶16; B 33-¶32; J 77-¶39

[12] H 6-¶20; C 22-¶14

[13] H 5-¶18

[14] B 32-¶28; J 76-¶33

[15] B 32-¶29; J 76-¶¶35, 36

[16] H 5-¶19; B 32-¶30; J 76-¶37

Thus, the complaints clearly allege that Petitioners Hanrahan and Jalovec, as well as the fourteen participating officers, did intentionally and negligently deprive plaintiffs of their civil rights by this illegal entry, assault, battery and other illegal acts, and in the case of Hampton and Clark, by the summary punishment of wrongful death.[17] Furthermore, as "immediate superiors of the raiding party" and/or as "co-participants," Hanrahan and Jalovec allegedly had prior knowledge of the conspiracy, had the power to prevent the illegal acts committed, and did absolutely neglect and refuse to do so.[18]

2. After the Raid

The complaints set forth events that transpired subsequent to the raid, which further deprived the surviving plaintiffs of their fundamental civil rights. The seven surviving occupants of Hampton's apartment were subjected to false imprisonment and to willful

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[17] Liability predicated upon 42 USC § 1981 et seq, particularly §1983. H 6-¶20, H 8-¶30; C 20-¶8; B 31-Count one, B 35-Count two; J 75 -Count one, J 82-Count two.

[18] Liability predicated upon 42 USC §1986; H 10-¶35; B 38-¶47; J 90-¶54

and malicious prosecution.[19] As characterized by the Seventh Circuit, the plaintiffs allege that Hanrahan, Jalovec and others were involved in "an extensive conspiracy to cause the false arrest and imprisonment of the surviving plaintiffs, the institution of an unfounded prosecution, and the concealment of the truth from the public."[20] Petitioners Hanrahan and Jalovec not only participated in this conspiracy,[21] but had the power and

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[19] Liability predicated upon 42 USC §1981 et seq., particularly §1983. B 39-Count five, B 52-Count nine; J 93-Count five, J 117-Count nine.

During and after the raid at Hampton's apartment, the fourteen participating officers and the seven members of the Police Department's Crime Laboratory and IID were employees of the City of Chicago. While duly employed officials of that City, defendants allegedly injured plaintiffs by their willful and wanton conduct, namely, the illegal entry, assault and battery, false imprisonment, and malicious prosecution of these Black Panthers. Under the theory of respondeat superior, the City of Chicago is liable for injuries sustained by plaintiff Brewer, who established jurisdiction by diversity of citizenship. (B 59-66)

[20] Pet. 8a

[21] Liability predicated upon 42 USC §§ 1983, 1985; B 41-Count six, B 43-Count eight; J 97-Count six, J 103-Count eight.

authority to prevent the harm suffered by Respondents, and once again did neglect and refuse to do so.[22]

The complaints allege that, in furtherance of this extensive conspiracy, Hanrahan, Jalovec, and others planned and agreed to lodge knowingly fraudulent charges of attempted murder, aggravated battery, and other offenses against the surviving plaintiffs.[23] After plaintiffs' arrests, bail was set prohibitively high. Plaintiffs were denied a preliminary hearing at which they would have been able to demonstrate the utter falsity of the charges.[24] Consequently, they remained illegally incarcerated on knowingly false charges for eighteen days.[25]

In conjunction with their actions concerning plaintiffs' imprisonment and prosecution, Hanrahan and Jalovec played primary roles in preparing and publicizing a falsified version of the raid. The complaints allege that defendants met and prepared a composite version of the raid that would justify the wanton brutality of the participating police officers.[26]

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[22] Liability predicated upon 42 USC §1986; B 42-Count seven, B 55-Count ten; J 100-Count seven, J 122-Count ten.

[23] B 40-¶50; J 93-¶57

[24] B 40-¶¶49, 50; J 93-¶¶56, 57

[25] B 40-¶52; J 94-¶59

[26] B 47-¶e; J 108-¶e

Portions of this falsified account were released to the press, television, and radio, including a detailed photographic report.[27] Hanrahan and Jalovec staged and directed a filmed re-enactment of the December 4th raid for television that they knew to be a false depiction of those occurrences.[28] Hanrahan requested an investigation by the Internal Inspections Division of the Chicago Police Department designed to corroborate his false version of the raid. He thereby once more sought to justify the illegal actions of the raiding officers, and to support the knowingly false criminal charges lodged against the surviving plaintiffs.[29]

B. Conduct Of Petitioners Sorosky, Meltreger, Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, And Sadunas.

The complaints allege that in periodic meetings after the raid, defendants Sorosky, Meltreger, Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, and Sadunas did plan, agree, and conspire to injure plaintiffs by preparing and circulating to the public a number of "official reports." These reports were calculated to falsify and distort the occurrences of the brutal December 4th raid. They also served to justify the continued

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[27] B 47-¶¶f,h; J 108-¶f, J 109-¶h

[28] B 48-¶i; J 109-¶i

[29] B 48-¶k; J 110-¶k

prosecution of the imprisoned plaintiffs.[30] The above-named Petitioners were specifically responsible for manipulating the investigations and findings of the Police Department Crime Laboratory and Internal Inspections Division.

The allegations concerning the Crime Laboratory officials charge that Sadunas and Purtell filed an incomplete and erroneous firearms report which incorrectly concluded that plaintiff Harris fired at the police during the raid.[31] At the Cook County Coroner's Inquest, Sadunas and Koludrovic testified falsely concerning the physical evidence removed from Hampton's apartment.[32] Sadunas, under oath, gave testimony before the Cook County Grand Jury that he knew to be false, inaccurate, and misleading.[33]

The entire IID investigation was allegedly a blatant attempt to further validate the knowingly false version of the raid. IID Supervisors Mulchrone and Ervanian intentionally avoided using standard investigatory procedures in order to prevent the disclosure of any damaging information.[34] In searching the apartment after the raid, Koludrovic and others sought only evidence of shots fired

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[30] B 44-¶60; J 104-¶67

[31] B 51-¶u; J 113-¶u

[32] B 50-¶t; J 113-¶t

[33] B 51-¶v; J 113-¶v

[34] B 48-¶1; J 110-¶1

by occupants and not evidence of the shots fired by the police.[35]

Petitioner Meade, along with Assistant State's Attorneys Sorosky and Meltreger, prepared all the questions with the corresponding desired answers in advance of the bogus IID interrogation of the fourteen participating police officers.[36] Sorosky, Meltreger, and Jalovec then met with those officers prior to the interrogation and informed them of the appropriate false responses to those questions.[37] These actions were taken to insure that there would be no discrepancy between the findings of the IID and Hanrahan's knowingly false version of the raid.

It is therefore clearly pleaded that, by participating in the concealment of the truth concerning the raid and in the willful and malicious prosecution of the survivors, Petitioners Sorosky, Meltreger, Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, and Sadunas intentionally deprived Respondents of their civil rights.[38] In addition, they conspired to deprive the survivors the the equal protection of the laws,[39]

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[35] B 46-¶c; J 107-¶c

[36] B 49-¶¶m,n; J 110-¶¶m,n

[37] J 111-¶o

[38] Liability predicated upon 42 USC §1981 et seq, particularly §1983; B 52-Count nine; J 117-Count nine.

[39] Liability predicated upon 42 USC §1983, §1985; B 43-Count eight; J 103-Count eight.

and neglected to prevent harm to those Respondents when they had the power, authority, and responsibility to do so.[40]

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[40] Liability predicated upon 42 USC §1986; B 55-Count ten; J 122-Count ten.

SUMMARY OF ARGUMENT

The complaints filed by Respondents allege that they have been injured and deprived of their statutory and constitutional rights at the hands of Petitioners, who planned and conducted a violent raid, intended to kill Fred Hampton and Mark Clark and injure other Respondents because of their race and political beliefs. Petitioners are also alleged to have engaged in subsequent conspiracies and illegal actions to obfuscate the nature of their own wrongdoings. The Court of Appeals properly held that the allegations sufficiently stated Civil Rights causes of action against Petitioner State's Attorneys, and that as a matter of law, the doctrine of quasi-judicial immunity does not require dismissal of these claims without trial.

Respondents seek to vindicate federally protected rights and to recover from Petitioners for the flagrantly illegal and ruthless acts which were totally unrelated to Petitioners' quasi-judicial offices. Petitioners attempt to shield themselves from liability for their misconduct by subverting the century-old doctrine of judicial immunity. This doctrine requires that the liability of judicial officers is to be determined by the nature of the conduct and not by virtue of the offices they hold. Petitioners urge that this Court undermine one hundred years of legal precedent and clothe them with an absolute protection from liability irrespective of the nature of their alleged misconduct. Respondents argue that the factual determination as to the nature of Petitioners' conduct, ordered by the Court of Appeals, should be allowed to proceed.

Respondents' complaints allege that Petitioners were engaged in,"an extensive con-

spiracy to cause the false arrest and imprisonment of the surviving plaintiffs and the institution of an unfounded prosecution, and the concealment of the truth from the public." See Statement of the Case, p. 12. The Court of Appeals properly held that these allegations were sufficient to sustain a civil conspiracy cause of action under the existing standards for such pleadings established by this Court.

The Court of Appeals properly held that the allegations in the Brewer complaint constituted sufficient causes of action, notwithstanding Petitioners' claim that the Illinois Tort Immunity Act precludes liability for the City of Chicago. Neither the Act nor the relevant Illinois case law supports this claim of immunity by the City of Chicago for the willful and wanton misconduct of its agents.

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE STATE'S ATTORNEY PETITIONERS ARE LIABLE FOR THE VIOLATIONS OF THE CIVIL RIGHTS ACTS AS ALLEGED IN THESE COMPLAINTS.

A. The Court Of Appeals Correctly Applied Existing Legal Standards, As Established By This Court, In Sustaining The Sufficiently Pleaded Theories Of Liability For These Prosecutorial Officials.

The Court of Appeals ruled that the District Court erred in holding that the immunity doctrine requires dismissal, without trial, of the causes of action against Petitioners Hanrahan and Jalovec for their alleged participation in the planning and execution of the raid.[41] This ruling is consistent with the legal standards established by this Court and with the decisional law of the other circuits. These decisions recognize a clear basis for allowing this civil action against these prosecutorial defendants.

Respondents allege that they have been the victims of a deliberate abuse of governmental power and a purposeful discrimination by these State's Attorneys. The acts for which Respondents seek to hold Petitioners liable "are manifestly [and] palpably beyond their authority," and have no "connection with the general matters committed by law to [their] control or supervision." Spalding v. Vilas,

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[41] Petitioners Hanrahan and Jalovec are also alleged to have been participants in the conspiracies subsequent to the actual planning and execution of the raid. These allegations are discussed in Part II, of this brief, infra.

161 U.S. 483, 498 (1896). The acts with which Petitioners are charged are unrelated to the judicial process and are nowhere authorized for them in the Statutes or Constitutions of Illinois or the Nation. Rather, the allegations charge that Respondents were subjected to the misuse of state power and the flagrant violation of their constitutional rights by these Petitioners, made possible only because Petitioners were clothed with the authority of state office.

This Court has consistently held that judicial and quasi-judicial officials are liable in damages when they act outside their judicial and quasi-judicial capacities. The leading decision of this Court concerning the doctrine of judicial immunity at common law holds that judicial officers will be liable to civil actions when they act in the absence of jurisdiction.[42] "Where there is clearly no jurisdiction ... any authority exercised is a usurped authority, and for the exercise of such authority ... no excuse is permissible." Bradley v. Fisher, 80 U.S. 335, 351-52 (1871). The planning, direction, and authorization of an illegal raid involving the use of deadly force clearly are not judicial or quasi-judicial functions.

This Court has also required that the liability of judicial and quasi-judicial officers is to be determined by the nature of their conduct and not by virtue of the offices

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[42] In Yaselli v. Goff, 12 F.2d 396 (2d Cir., 1926); aff'd per curiam, 275 U.S. 503 (1927), on the authority of Bradley v. Fisher, 80 U.S. 335, 347 (1871) and Alzua v. Johnson, 231 U.S. 106, 111 (1913), it was held that the doctrine of judicial immunity was to be afforded to "quasi-judicial" officers, such as prosecuting attorneys.

they hold. Specifically, such officials are liable for actions which are not discretionary. Ex Parte Virginia, 100 U.S. 339 (1879). "It is not the title of office but the duties with which the particular officer ... is entrusted ... which must provide the guide in delineating the scope of the rule which clothes official acts ... with immunity ...." Barr v. Mateo, 360 U.S. 564, 573 (1959). "There is no litmus paper test to distinguish acts of discretion**, ... the determination of the real question [is whether] the act complained of [is] the result of a judgment or decision which it is necessary that the government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir., 1962).

The obligation of these Petitioners to protect life, liberty and due process, and to afford the equal protection of the laws, is not a discretionary governmental function. Such protections are constitutional guarantees. Petitioners, like all public officials, have a duty to insure the protection of such rights. See, Logan v. United States, 144 U.S. 263 (1892); Screws v. United States, 325 U.S. 91 (1945); and Monroe v. Pape, 365 U.S.167 (1961). Respondents allege that these prosecutorial defendants have unlawfully, willfully, and maliciously violated their constitutional rights and deprived them of the equal protection of the laws. It is anomalous for Petitioners to suggest that such unlawful, willful and malicious violations of the Constitution have ever been committed by law to the discretionary control or supervision of any officer, regardless of rank or station in the government. No official is given a "discretionary function" which constitutes a license to violate the fundamental rights

guaranteed by the Constitution. Where judicial officers, such as these prosecuting attorneys, engage in deliberate violations of constitutional rights, such conduct is beyond the scope of duties constituting an integral part of the judicial process, and has no, "connection with the general matters committed by law to the officer's control." Spalding v. Vilas, supra, at 498. Hence, these prosecutors cannot, "shelter [themselves] from liability by the plea that [they] are acting under color of office (citations omitted)." Lynch v. Johnson, 420 F.2d 818, 821 (6th Cir., 1970).

This Court has continually refused to extend the doctrine of immunity to exempt judicial officers from liability in damages for the type of conduct alleged in this case. In Yaselli v. Goff, 12 F.2d 396 (2d Cir., 1926); aff'd per curiam, 275 U.S. 503 (1927), on the authority of Bradley v. Fisher, supra, and Alzua v. Johnson, 231 U.S. 106 (1913), the Court emphasized that prosecuting attorneys would be liable for misconduct unrelated to the duties of a quasi-judicial officer, Yaselli v. Goff, supra, at 406. "If [a prosecuting attorney] proceeds upon such a course of action, he does so at the same peril as does the unofficial citizen. His office is not a cloak to protect him from liability for a wrong thereby resulting to an innocent person." Schneider v. Shepherd, 192 Mich. 82, 88, 158 N.W. 182, 184 (1916), cited with approval in Yaselli v. Goff, supra, at 405.[43]

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[43] Yaselli v. Goff, supra, aff'd per curiam by this Court, relies on two cases where prosecuting attorneys were held liable in civil damages. Because of the remarkably similar facts, significant portions of

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those cases are quoted:

> In Schneider v. Shepherd, 192 Mich. 82 158 N.W. 182 (1916), the prosecuting attorney directed the chief of police of the city of Detroit to raid a certain house and arrest the inmates and bring them to police headquarters. This he did on the strength of a report ... that the place to be raided was a house of prostitution. It was in fact the home of a reputable citizen. The action brought was for an illegal arrest, and the defense interposed was probable cause, and that defendant was entitled to the immunity of a quasi-judicial officer. The trial judge called attention to the fact that under the Constitution and statutes of Michigan the duty of prosecuting attorneys was to prosecute or defend in all the courts of the county all prosecutions, suits, applications, and motions, whether civil or criminal, in which the state or county may be a party .... The judge went on to say: "The investigation of alleged crimes by the prosecuting attorney, ... finds no statutory sanction in the prescribed powers and duties of a prosecuting attorney. If he proceeds upon such a course of action, he does so at the same peril as does the unofficial citizen. His office is not a cloak to protect him from liability from a wrong thereby resulting to an innocent person subjected to false arrest. The statute affords no such robe of immunity."
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> "In Leong Yau v. Carden, 23 Hawaii, 362, 369, the court said: "A public prosecuting officer, in determining whether certain purported facts

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The Civil Rights Acts were enacted specifically to provide a mechanism whereby the federal system could intervene when public officials, acting under color of law, deprived citizens, like these Respondents, of rights guaranteed to all, irrespective of race. Monroe v. Pape, 365 U.S. 167 (1961). The role of the federal government as a guarantor of basic federal rights against the abuse of power by the states was clearly established. Bell v. Hood, 327 U.S. 678 (1946). "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions ... upon rights secured by the Constitution and laws of the Nation." Mitchum v. Foster, 407 U.S. 225, 239

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> ... justify the accusation and prosecution of a person believed to have committed an offense, acts in a quasi-judicial capacity, and he is not to be held liable in damages for an honest mistake or error of judgment in instituting a criminal proceeding against such person. But if he prosecutes without probable cause and with malice he certainly is in no better position than the judge of a court--superior or inferior --who proceeds maliciously and without any jurisdiction .... Public prosecuting officers are entitled to protection against claims growing out of the discharge of their duties done in good faith though with erroneous judgment, but private individuals are entitled to the protection of the law against any conduct of such officers which is at once reckless, malicious, and damaging."
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> Id. at 405-406.

(1972).[44]

The decision of the Seventh Circuit is also consistent with the decisions of other Circuits. The Circuits have consistently applied the "absence of jurisdiction" test established by this Court in Bradley v. Fisher, supra, to determine the applicability of the immunity defense to a prosecuting attorney.[45] Whenever the defense of prosecutorial immunity is raised, the dispositive inquiry becomes whether the allegations are sufficiently removed from judicial (or quasi-judicial activity) to warrant removing the cloak of immunity from defendant prosecutors. See Littleton v. Berbling, 468 F.2d 389, 410-411 (7th Cir., 1972). Petition for Certiorari pending as to Petitioner prosecutor Berbling; Certiorari granted as to other parties. ___ U.S. ___, 93 S. Ct. 1544 (1973).

In Lewis v. Brautigam, 227 F.2d 124 (5th Cir., 1955), the Fifth Circuit held that a

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[44] The Seventh Circuit's opinion is in accord with this Court's decision in Pierson v. Ray, 386 U.S. 547 (1967). In Pierson, supra, this Court held that the common law doctrine of immunity for judicial officers was unimpaired by the Civil Rights Act. Unlike this case, the record in Pierson, supra, was, "barren of any proof or specific allegation that [the] judge played any role in [the] arrests and convictions other than to adjudge petitioners when their cases came before this Court." Id. at 553. In the present case, Respondents have alleged conduct on the part of Petitioners, which constitutes extremely aggravated wrongs and ruthless violations of their Constitutional rights.

[45] The Circuits uniformly agree that prosecutorial immunity, derived from judicial

(footnote continued on next page)

state's attorney who ordered two deputy sheriffs to force the plaintiff to be photographed in convict garb at a state prison and attempted to coerce the plaintiff to plead guilty to a criminal charge could be liable for damages under Sections 1983 and 1985:

> ...[A] quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot

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immunity, was extended to prosecutors as quasi-judicial officers, and is limited to actions within the scope of a prosecutor's duty. See, e.g., Dacey v. New York Lawyers' Ass'n., 423 F.2d 188 (1969), cert. denied, 398 U.S. 929 (1970), Second Circuit; United States ex rel Rauch v. Deutsch, 456 F.2d 1301 (1972), and Bauers v. Heisel, 361 F.2d 581 (1966), cert. denied, 386 U.S. 1021 (1967), Third Circuit; McCray v. Maryland, 456 F.2d 1 (1972), Fourth Circuit; Madison v. Gerstein, 440 F.2d 338 (1971), and Lewis v. Brautigam, 227 F.2d 124 (1955), Fifth Circuit; Hilliard v. Williams, 465 F.2d 1212 (1972), cert. denied, 409 U.S. 1029 (1972), Sixth Circuit; Littleton v. Berbling, 468 F.2d 389 (1972), petition for Certiorari pending as to Petitoner Berbling, Certiorari granted as to other parties, 93 S.Ct. 1544 (1973), and Cawley v. Warren, 216 F.2d 74 (1954), Seventh Circuit; Rhodes v. Houston, 202 F.Supp. 624 (1962), aff'd per curiam, 309 F.2d 959 (1962), cert. denied, 372 U.S. 909 (1963), Eight Circuit; Dodd v. Spokane County, Washington, 393 F.2d 330 (1968), and Robichaud v. Ronan, 351 F.2d 533 (1965), Ninth Circuit; Valdez v. Black, 446 F.2d 1071 (1971), cert. denied 405 U.S. 963 (1972), and Kostal v. Stoner, 292 F.2d 492 (1961), cert. denied, 369 U.S. 868 (1962), rehearing denied, 370 U.S. 920 (1962), Tenth Circuit.

> shelter himself from liability by the plea that he is acting under color of office. Id. at 129.

Recently, the Fifth Circuit reiterated its holding in Lewis, supra, in Guedry v. Ford, 431 F.2d 660 (5th Cir., 1970):

> A prosecuting attorney, when acting in his official capacity is protected by the same immunity in civil cases that is applicable to judges, provided that his acts are within the scope of his jurisdiction and by authorization of law. (citations omitted)
> Id. at 663.

In so holding, the Court cited analagous decisions by other federal courts with approval.[46]

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[46] The Fifth Circuit opinion in Guedry v. Ford, supra, cited cases from other Circuits with approval: Peek v. Mitchell, 419 F.2d 575 (6th Cir., 1970); Bauers v. Heisel, supra; Friedman v. Younger, 282 F.Supp. 710 (C.D. Calif., 1968); Cf. Peterson v. Stanczak, 48 F.R.D. 426 (N.D. Ill., 1969). Petitioners contend that the Fifth Circuit has, "adopted a slightly stricter twofold standard," than the "jurisdictional test" of the Third Circuit in Bauers v. Heisel, supra, (Petition of Hanrahan, et al., p. 9). The Fifth Circuit's reliance on the Bauers test for its formulation of the test for prosecutorial immunity, refutes Petitioners' attempt to differentiate the tests used by the Third and Fifth Circuits.

In Robichaud v. Ronan, 351 F.2d 533 (9th Cir., 1965), the Ninth Circuit held that a complaint sufficiently stated a civil rights claim for damages against the prosecuting attorneys for an alleged attempt to coerce a confession to a murder. In reinstating the complaint which the District Court had dismissed, the Court of Appeals stated that:

> Section 1983 ... was intended to provide a remedy to persons subjected to '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, ...' (citation omitted). Thus, if immunities are broadly granted to state officers without consideration of the nature of their alleged misdeeds and the reason for the immunity, the statute becomes subject to circumvention, if not emasculation.
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> * * *
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> "Prosecutors are not immune from suit under the act simply as a matter of status wholly without regard to the nature of their conduct." (citations omitted)
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> * * *
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> The title of office, quasi-judicial or even judicial, does not of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of the judicial process.
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> Id. at 536-38.

In reaching its result in Robichaud, supra, the Ninth Circuit relied on the reasoning of the Fifth Circuit in Lewis v. Brautigam, supra:

> In the Lewis case, a state's Attorney, an official prosecutor, was sued, not for acts done in the course of his quasi-

> judicial role, but rather for acts done in his investigative role .... [I]f the State's Attorney ordered and directed the officers to force the plaintiff to plead guilty, then certainly he is no less liable than are those who carried out his instructions .... We agree with the reasoning of the Lewis case, and we must apply the principle here. The trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial' role. If they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them. (citations omitted) Robichaud v. Ronan, supra, at 537.[47]

The Third Circuit has agreed with the other Circuits on the circumstances which will render prosecuting attorneys liable to civil suits. In Bauers v. Heisel, 361 F.2d 581 (1966), the

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[47] Petitioners also attempt to create a distinction between the standards used by the Fifth Circuit in Lewis v. Brautigam, supra, and the Ninth Circuit in Robichaud v. Ronan, supra. This distinction is without foundation, since the Court in Robichaud v. Ronan, supra, at 537, emphasized its reliance on the reasoning used by the Fifth Circuit in Lewis v. Brautigam, supra. Prosecutors are liable for investigative acts under Robichaud, supra, because such acts are not within the scope of a prosecutor's quasi-judicial duty.

Court stated:

> The immunity of a prosecutor, however, is not without limitation; it is not absolute. The immunity of judges, from which the immunity of prosecutors is derivative, does not extend to acts which are clearly outside their jurisdiction. Bradley v. Fisher, supra.
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> The clear-absence-versus-mere-excess of jurisdiction distinction has, in substance, been adopted and applied in Civil Rights Act cases brought against judges and other judicial officers. Robichaud v. Ronan, [supra]; Corsican Productions v. Pitchess, 338 F.2d 441 (C.A. 9, 1964); Spires v. Bottorff, 317 F.2d 273 (C.A. 7, 1963); Lewis v. Brautigam, [supra].
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> Id. at 590-591.[48]

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[48] Gaito v. Strauss, 249 F. Supp. 923 (W.D. Penn. 1966), aff'd on other grounds, 368 F. 2d 787 (3d Cir., 1966) is cited by Petitioners as a rejection of the Robichaud "quasi-judicial/ investigative test." (Petition of Hanrahan, et al., p. 15). Dicta in the District Court did reject the Robichaud formulation, however this view was not adopted by the Third Circuit which affirmed on other grounds. Further, the Third Circuit's approval of both the Robichaud and Lewis opinions in the Bauers case, convincingly repudiates the proposition that the Third, Fifth and Ninth Circuits have employed disparate tests. The Third Circuit recently affirmed its holding in Bauers v. Heisel, supra, in Moore v. Buck, 443 F.2d 25, 26 (3rd Cir., 1971).

The Tenth Circuit has applied the same test rendering prosecutors liable for acts not within the scope of their official duties. Kostal v. Stoner, 292 F.2d 492 (10th Cir., 1961), certiorari denied, 369 U.S. 868 (1962), rehearing denied, 370 U.S. 920 (1962). More recently, the Tenth Circuit has reiterated its adherence to this test used by the other Circuits. Valdez v. Black, 446 F.2d 1071 (1971). In sustaining the trial court's instructions to the jury regarding prosecutorial immunity in a Civil Rights action, the Court of Appeals held:

> The gist of the [immunity] instruction was that the law grants immunity to a district attorney for acts done or ordered by him in the performance of his official duties as an integral part of the judicial process, but that if a district attorney abandons the performance of his official duties and commits or directs the commission of acts which are ordinary police activity instead of judicial activity ... then he is no less liable than those who carry out his instructions. We perceive no error in giving this instruction and believe it to be in line with such cases as Kostal v. Stoner, 292 F.2d 492 (10th Cir., 1961). See also, Dacey v. New York County Lawyers' Assn., 423 F.2d 188 (2d Cir., 1969), cert. denied, 398 U.S. 929; Kauffman v. Moss, 420 F.2d 1270 (3d Cir., 1970), cert denied 400 U.S. 846 (1970); Peek v. Mitchell, 419 F.2d 575 (6th Cir., 1970); Sires v. Cole, 320 F.2d 877 (9th Cir., 1963). Indeed, the instruction thus given squares pretty much with Robichaud v. Ronan, supra, ... In Robichaud, it was stated that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity,

> then the reason for his immunity (integral relationship between his acts and the judicial process) ceases to exist and if he acts in the role of a policeman, he should be liable as a policeman.
> Id. at 1077-78.

Similarly, in Hilliard v. Williams, 465 F.2d 1212 (6th Cir., 1972), cert. denied, 409 U.S. 1029 (1972), the Sixth Circuit refused to shelter with immunity, a prosecuting attorney who was charged with conduct clearly outside his quasi-judicial capacity. The Court held that the deliberate suppression of favorable evidence by a prosecuting attorney, in violation of plaintiff's constitutional rights, was an act outside his quasi-judicial capacity and beyond the scope of, "duties constituting an integral part of the judicial process." Id. at 1218.

The Eighth Circuit, in Rhodes v. Houston, 202 F. Supp. 624, (1962), aff'd per curiam, 309 F.2d 959 (8th Cir., 1962), cert. denied 372 U.S. 909 (1963), and the FourthCircuit in McCray v. Maryland, 456 F.2d 1 (4th Cir., 1972), have also held that a prosecuting attorney may be liable in damages under Sections 1983 and 1985 when sued for acts committed in the absence of jurisdiction (Rhodes v. Houston, supra, at 630), or where an official is not called upon to exercise judicial or quasi-judicial discretion (McCray v. Maryland, supra, at 3).[49]

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[49] In McCray v. Maryland, supra, a prisoner brought an action under the Civil Rights Act against a State Court clerk alleging negligence, which impeded the filing of plaintiff's petition for post-conviction relief. In the opinion the Court discussed the doctrine of quasi-judicial immunity. Id. at 3.

The disposition of this case by the Court of Appeals for the Seventh Circuit is in complete uniformity with the treatment of analagous cases in the other Circuits. The Court of Appeals ruled that the District Court had erred in holding that the immunity doctrine requires dismissal of the charges against defendants, without trial. The allegations were sufficient to entitle Respondents to present proof for a factual determination of the nature of the alleged conduct, where defendants were charged with conduct so clearly outside their quasi-judicial capacities.[50]

B. The Court Of Appeals Correctly Held That Petitioners Are Not Entitled To Immunity As a Matter Of Law And The Case Was Properly Remanded Because The Sufficiently Pleaded Allegations Entitled Respondents To Present Their Proofs.

The issue presented regarding the prosecutorial defendants is whether the alleged conduct falls within the realm of their

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[50] Petitioners' proclamation that the Seventh Circuit Court of Appeals had made a factual determination that defendant prosecutors' activity was outside the scope of immunity because it was investigatory is patently incorrect. (Petition of Hanrahan, et al., p. 10) The Seventh Circuit remanded this case for a factual determination of this very issue. The holding merely rejected dismissal of this case before trial.

quasi-judicial duties.[51] The complaints allege that Petitioners Hanrahan and Jalovec, along with 14 police officers, planned the raid and agreed to use excessive force against Hampton and other Respondents, as part of an overall conspiracy to deprive Respondents of their constitutional and statutory rights and to discriminate against them because of their race and political beliefs. Respondents allege that Hanrahan and Jalovec were involved in, "an extensive conspiracy to cause the false arrest and imprisonment of the surviving [Respondents], to institute an unfounded prosecution, and to conceal the truth from the public." Hanrahan and Jalovec are charged with playing primary roles in preparing and publicizing a falsified version of the raid. (See Statement of the Case, supra, p. 5)

These allegations do not merely charge Petitioners with incorrectly executing their authorized prosecutorial duties or with making mistakes or errors in judgment in conducting their quasi-judicial activities. Under any reasonable construction of these complaints, it is clear that they allege acts by defendant state's attorneys which are unrelated to their quasi-judicial duties. There can be no authorization in law for state's attorneys to plan and direct illegal raids as herein described. Planning a raid where deadly force was to be used and permitting the use of deadly force as alleged here, cannot conceivably be related to quasi-judicial

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[51] The Seventh Circuit did not resolve this issue as petitioners suggest. (See fn.50 p.34) For purposes of withstanding a motion to dismiss, these allegations must be assumed to be true.

functions. Likewise, the planning and participation in a concerted effort to cover-up the unlawful nature of the raid cannot be an aspect of these prosecutors' quasi-judicial functions.

The Seventh Circuit stated that "[a]t the very least [the allegations charge] that Hanrahan and Jalovec planned a raid in order to obtain evidence of criminal activity." (emphasis added) (Pet. 7a). The Court of Appeals of course recognized that the allegations against these Petitioners are far broader and far more onerous than claims of excesses in investigatory conduct. The Seventh Circuit stated that these, "complaints may be read to charge that [Petitioners] deliberately planned to have the police officers kill Hampton and Clark." (Pet. 8a) It was only because the Seventh Circuit limited its review with respect to each Respondent to the question of, "whether any sufficient claim for relief has been alleged,"[52] that the Circuit did not construe the more onerous and expansive allegations charging the planning of a murder. These allegations remain in this case with their original force and effect. (See, Statement of the Case, supra, p. 5)

However, even when these allegations are given their most narrow construction, such

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52 Pet. 3a. The Seventh Circuit suggested that Respondents had not urged this reading of these complaints on the Court. Respondents do not understand the source of this comment. To the contrary, Respondents have consistently urged the more severe reading of the allegations.

"investigative" pursuits are nowhere authorized for Petitioners in the statutes of Illinois.[53] The Illinois Revised Statute, Ch. 14, sec. 5, limits the authority of state's attorneys to quasi-judicial acts in the course of proceedings before a court or jury. Petitioners were not "using the power for any of the purposes on whose account it was vested in them," Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir., 1949), cert. denied, 339 U.S. 949 (1950). Accordingly, the Seventh Circuit correctly ordered that the facts with reference to the alleged charges[54] be more fully developed at trial to determine their truth.[55]

Prosecutors have been afforded immunity for acts in the discharge of their quasi-judicial duties because their primary responsibility is essentially judicial--the

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53 See Ill. Rev. Stat. reprinted at p. 3 supra, of this brief.

54 It is axiomatic that the allegations of the complaints and the inferences to be drawn therefrom must be construed most favorably to the Respondents. See, Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

55 The trial court is the proper forum for the determination of these factual issues, See, e.g., Kauffman v. Moss, supra; Madison v. Purdy, 410 F.2d 99 (5th Cir., 1969); Lewis v. Brautigam, supra; Hilliard v. Williams, supra; Littleton v. Berbling, supra; Dodd v. Spokane County, Washington, supra; Robichaud v. Ronan, supra; Valdez v. Black, supra.

prosecution of the guilty and the protection of the innocent. Griffen v. United States, 295 F. 437, 439-40 (3rd Cir., 1924). In the proper exercise of judicial duties, judicial liability would detract from "principled and fearless decision-making" and destroy the independence of judicial officers by intimidation. Pierson v. Ray, supra, at 554. However, if the integrity of the judiciary is to be preserved, the concepts of "fearless decision-making" and "judicial independence" cannot be subverted so that quasi-judicial officers are free to maliciously misuse their powers in the manner alleged in this case. "The privilege is not a badge or emolument of exalted office but an expression of a policy designed to aid in the effective functioning of government." Barr v. Mateo, supra, at 572-73. Petitioners implore this Court to clothe them with an absolute and unprecedented privilege, which would allow them to deliberately and recklessly violate with impunity the rights guaranteed to all citizens. This Court cannot acquiesce in such a wholesale suspension of constitutional guarantees.

The Civil Rights Statutes were enacted specifically to protect citizens from the kind of oppressive state action which Respondents allege. See, Monroe v. Pape, 365 U.S. 167, 169-70 (1961). "Section 1983 ... was intended to provide a remedy to persons subjected to '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,...'" Robichaud v. Ronan, supra, at 536. No person, irrespective of his official position, may, by design or otherwise, subject a citizen to a deprivation of any rights secured by the Constitution or laws of the United States. Dombrowski v. Pfister, 380 U.S. 479 (1965).

The fact that Petitioners are state's attorneys does not relieve them of their fealty to the Constitution and laws of the United States. United States v. McLeod, 385 F.2d 734, 738 n.3 (5th Cir., 1967); Ill. Rev. Stat., ch. 14 §1 (1971); Ill. Rev. Stat., ch. 37 §72.2 (1971). "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause ...." Gregoire v. Biddle, supra, at 581.

In sum, this is not a case in which a dissatisified litigant is, "sufficiently irritated to institute an action against a [judicial officer] for his judicial acts," ill-conceived, or incorrect judicial judgments. Bradley v. Fisher, supra, at 348. Rather, Respondents seek to redress the heinous injuries they suffered at the hands of Petitioners, whose alleged conduct finds no statutory or constitutional sanction in the prescribed powers and duties of prosecuting attorneys.

The consequences of an unwarranted intrusion into the ongoing factual determination of these allegations by this Court are ominous. It would have the effect of transforming judicial immunity into a prerogative of office, thereby derogating a century of judicial authority concerning the doctrine; stripping the Civil Rights Act of its damage remedy; denying citizens an opportunity to vindicate their federally protected rights; and encouraging public officials to act in violation of the Constitution and the laws of this nation with the guarantee that they will not be liable to the victims of their official misconduct.

II. THE COURT OF APPEALS CORRECTLY APPLIED EXISTING LEGAL STANDARDS, AS ESTABLISHED BY THIS COURT AND FOLLOWED BY THE CIRCUIT COURTS, IN SUSTAINING LIABILITY IN CIVIL CONSPIRACY FOR OFFICERS MULCHRONE, ERVANIAN, MEADE, KUKOWINSKI, PURTELL, KOLUDROVIC, SADUNAS, MELTREGER, SOROSKY, HANRAHAN, AND JALOVEC.

The Court of Appeals held that the facts alleged in Respondents' complaints were sufficient to sustain a cause of action against these Petitioners for the conspiracies subsequent to the actual planning and execution of the raid.[56] This decision is consistent with decisionsof other circuits and in accord with the controlling decisions of this Court.

This Court has held that a cause of action should withstand a motion to dismiss, unless, assuming the facts alleged are true, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-6 (1957). The Circuit Courts have uniformly applied the standard to make every effort to save a claim in construing the facts alleged in a complaint, especially in a Civil Rights action. Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir., 1970), cert. denied, 400 U.S. 853 (1970); Scher v. Board of Education, 424 F.2d 741 (3rd Cir., 1970); Barnes v. Merritt, 376 F.2d 8 (5th Cir., 1967); York v. Story, 324 F.2d 450, 453 (9th Cir., 1963), cert. denied, 376 U.S. 939 (1964). Accordingly, the Seventh Circuit construed Respondents' complaints to allege, "an extensive

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[56] See Statement of the Case, supra, p. 11

conspiracy to cause the false arrest and imprisonment of the surviving plaintiffs, the institution of an unfounded prosecution, and the concealment of the truth from the public." (See Statement of the Case, p. 12.) The complaints clearly support this reading of the facts. They categorically reject Petitioners' illfounded attempt to posit one act committed by them in furtherance of the overall conspiracy, to wit, perjury, as the purpose of the conspiracy itself. (See Petition of the City of Chicago at 8.)[57]

This Court has also determined the circumstances when factual allegations will be legally sufficient to sustain a cause of action under the Civil Rights Act. In Adickes

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[57] Petitioners seek certiorari on the basis of hypothetical and irrelevant questions as to whether perjury constitutes a cause of action under the Civil Rights Act. Perjury is only one act allegedly committed in furtherance of an overall conspiracy to cover-up flagrant police misconduct and to prolong the illegal prosecution of Respondents. The overall conspiracy also allegedly involved other acts such as obstructing and curtailing normal investigation procedures and preparing false laboratory and firearm reports. Petitioners' reliance on Edwards v. Vasel, 349 F. Supp. 164 (E.D. Mo. 1972), aff'd per curiam, 469 F.2d 338 (8th Cir., 1972), is unfounded because the defendant policeman was only accused of perjury and because he had already been exonerated of the same charge in two previous judicial proceedings. It was also found that the police officer was not acting under color of state law, but rather he was found to be acting in his individual capacity. The instant allegations allege actions undertaken under color of law. Id. at 165-66.

v. S. H. Kress & Co., 398 U.S. 177 (1970), the Court sustained a civil conspiracy cause of action in the face of a motion to dismiss by summary judgment. The Court stated: "In this case ... we hold that respondent failed to show conclusively that the fact alleged by petitioner was 'not susceptible' of an interpretation that might give rise to an inference of conspiracy." Id. at 160 n. 22. The Court of Appeals applied this legal standard, effectively rejecting Petitioner's arguments before this Court, when it suggested that to require the proof of causation and injury Petitioners seek would be to require Respondents to plead their evidence. (Pet. 9a) A complex network of substantive facts are alleged which, if assumed to be true, would reasonably permit a jury to infer the existence of the conspiracy alleged. The issues raised by the Petitioners as to causal connection[58]

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[58] Petitioners rely on Duncan v. Nelson, 466 F.2d 939 (7th Cir., 1972), to argue that the indictment of Respondents was a superceding cause which exonerated Petitioners from liability. However, in Duncan, enough evidence existed to convict without the illegal evidence obtained from the police defendant. Petition of City of Chicago, et al., p. 11. Respondents here allege that their detention would not have continued and an indictment would not have been secured without Petitioners' cover-up of the underlying police misconduct. (See Statement of the Case, supra, pp. 13-15.)

The police were also exonerated in Duncan because the superceding judicial action in admitting the illegally-obtained confession into evidence was not forseeable by the police. Respondents here allege Petitioners clearly foresaw and even intended that their cover-up of police misconduct would result in an indictment of the Respondents.

and extent of the injury[59] are also questions for the finder of fact. (Pet. 9a) All these fact questions are at least, "'susceptible of' an interpretation which might give rise to an inference of conspiracy." Adickes v. S. H. Kress & Co., supra, at 160 n.22.[60] The

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[59] Petitioners rely on Symkowski v. Miller, 294 F. Supp. 1214 (E.D. Wis., 1969), to argue that a conspiracy action cannot lie where there is no conviction and no knowing use of the perjured testimony. However, the facts in Symkowski are inapposite. Plaintiff only alleged perjury by the police at a trial in which he was acquitted of criminally reckless conduct after having mistakenly shot one of the policemen. In contrast, Respondents here allege perjury was only one act in furtherance of the overall conspiracy directed toward continuing a blatantly illegal arrest, detention, and prosecution as well as to cover-up the illegal character of the raid.

[60] Petitioners argue that no set facts could prove a conspiracy by these Petitioners on the facts alleged because they cannot be held liable for concealment of facts they do not fully possess. However, the destruction of evidence by the policemen who participated in the raid does not absolve these Petitioners from liability for knowingly obstructing, curtailing, and distorting investigation and analysis of the remaining evidence, or for distorting and falsifying tests of the veracity of the accounts given by the participating policemen. Because the Crime Laboratory and IID Petitioners are alleged to have conspired with Petitioners Hanrahan and Jalovec, the complaints charge that the Crime Laboratory and IID Petitioners knew of the inadequate investigation of the premises and destruction of evidence and the overall plan to conceal the nature of the raid.

Seventh Circuit decision should therefore not be reviewed by this Court. Adickes v. S. H. Kress & Co., Id.

Considering the heinous nature of the sufficiently pleaded facts it was necessary for the Seventh Circuit to sustain the cause of action against these Petitioners. This honorable Court should affirm this decision by denying Certiorari in this case.

III. PETITIONER SEEKS TO AVOID THE APPLICATION OF ILLINOIS TORT LAW INVOKED IN RESPONDENT BREWER'S DIVERSITY CLAIMS, WHICH PROVIDES FOR THE LIABILITY OF PETITIONER CITY OF CHICAGO FOR THE WILLFUL AND WANTON ACTS OF ITS EMPLOYEES.

Apart from her Civil Rights claims, Respondent Brewer sued the several Petitioners for various Illinois common law torts.[60] To do so, she invoked the diversity jurisdiction of the District Court. The Court of Appeals, in reversing the District Court, held that the allegations in the Brewer complaint constituted sufficient causes of action, notwithstanding Petitioner's claims that the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. Ch. 85 §§ 1-101 et seq.) would preclude liability for the City of Chicago.

It is clear from the facts of this case that the Illinois Tort Immunity Act does not grant immunity to the City of Chicago.[61]

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[60] See B 59-B 66.

[61] The only relevant situation where a municipality would properly be immune from suit is set forth in §2-109 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act:

> §2-109. Acts or Omissions.
> A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

The pertinent question then becomes when is an employee immune from suit. Later sections of the act make this clear:

(footnote 61 continued on next page)

(footnote 61 continued from previous page)

> §2-201. Determination of policy or exercise of discretion.
> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.
>
> §2-202. Execution or enforcement of law.
> A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton negligence.
>
> §2-208. Institution or prosecution of judicial or administrative proceeding.
> A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, unless he acts maliciously and without probable cause.

§2-201 does not afford immunity to Petitioner, because Respondents allege acts outside the discretion of any of the City employee Petitioners.

§2-202 does not afford immunity to Petitioner, because Respondents allege 1) acts in violation of the law and 2) willful and wanton misconduct.

§2-208 does not afford immunity to Petitioner, because Respondents allege the employee Petitioners 1) acted outside the scope of their employment and 2) acted maliciously and without probable cause.

(footnote 61 continued on next page)

Due perhaps to a recognition that this is true, no specific section of the Statute is cited in the City of Chicago's Petition which on these facts would grant immunity to the City.[62] Not only the words, but the purpose of the

(footnote 61 continued from previous page)

Since the Tort Immunity Act outlines specific instances where government employees can claim immunity, and since Petitioner does not cite any section which would grant immunity for willful and wanton misconduct outside the scope of one's employment, it follows by the rule of statutory construction, expressio unius est exclusio alterius, that for such conduct there must be liability. The Illinois courts have frequently applied this rule of construction where there is doubt as to the meaning of a statute and where legislative intent cannot be gleaned. See, e.g., Nelson v. Union Wire Rope Corp., 32 Ill. 2d 69, 199 N.E. 2d 769, 786 (1964), and Savings Ass'n v. International Ins. Co., 17 Ill. 2d 609, 612, 162 N.E. 2d 345, 346 (1959).

However, this Court need not rely on this rule of construction in the instant case, since there can be no doubt as to the intention of the Illinois Legislature in passing the Tort Immunity Act. See nn. 63 & 64, infra.

[62] In fact, nowhere in its brief does Petitioner put the words of the Tort Immunity Act before this Court for its consideration.

Tort Immunity Act[63] shows conclusively that the City is totally unjustified in citing

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[63] The purpose of the Act is explained in Luker v. Nelson, 341 F. Supp. 111, 117-118 (N.D. Ill. 1972):

> The Act was adopted in 1965 immediately after the Illinois Supreme Court had eliminated the last vestige of the doctrine of governmental immunity, Harvey v. Clyde Park District, 32 Ill. 2d 60, 203 N.E. 2d 573 (1965), and was intended "to salvage certain protections for public entitles some of which had found themselves subject to suit for the first time." Ritsema-Millgard, Inc. v. Michael J. McDermott & Company, 295 F. Supp. 180 (N.D. Ill. 1969).
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> * * *
>
> ... [T]he language and legislative history of the Governmental Tort Immunity Act indicate that the Illinois legislature intended to confine its scope to suits ... for which municipalities had just become liable .... (emphasis added)

Since before the passage of the Tort Immunity Act, immunity in Illinois was conditioned upon a showing of good faith (See, e.g., Baum, "Tort Liability of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act," 1966 Univ. of Ill. L.F. 981, 1003, and cases cited therein), and given the purpose of the act (as stated in both Luker and Ritsema-Millgard, supra), it follows that the Illinois Legislature did not intend to grant immunity for acts committed in bad faith such as Respondents allege, because for such acts immunity had never before existed.

generally to the Act to support its claim of immunity, since conduct not specifically immunized by the Statute is necessarily subject to claims of liability.[64]

As correctly construed by the Court of Appeals, the relevant Illinois case law does

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[64] See, e.g., Comments, "Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois," 61 NW.U.L.Rev., 265, 281 (1966-1967), where the author states,

> The Illinois statute ... is based on the proposition that there is no local governmental tort immunity; local governmental units are fully liable. *** Then ... the Illinois act provides as exceptions that many functions of municipal corporations will be immune from suit. ... [I]n Illinois liability is imposed under the same rules applicable in private tort actions, subject to the immunity exceptions provided for in the act. (emphasis added)

The above analysis is convincing, given the purpose of the act (See n.63, supra.). The Illinois Legislature, cognizant that all immunity had been wiped out by the Illinois Supreme Court, carefully set forth specific instances where it determined immunity should continue to exist. The Legislature realized that where it did not clearly and specifically provide for immunity, there would necessarily be liability.

Finally, a recent Illinois Supreme Court decision lends further support for Respondents' position. Reynolds v. City of Tuscola, 48 Ill. 2d 339, 270 N.E. 2d 415, (1971), holds that the Tort Immunity Act must be strictly construed against public defendants.

not grant immunity to Petitioner on the diversity claims.[65] Moreover, this case law, as well as the analysis of it by the Court of Appeals, is completely misstated in the Petition for Certiorari.[66]

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[65] In fact, the Illinois case law strongly suggests liability where bad faith or willful and wanton misconduct is alleged. See, e.g., Young v. Hansen, 118 Ill. App. 2d 1, 8, 249 N.E. 2d 300, 304 (2d District 1969) ("... [T]he immunity afforded by section 2-201 ... extends only to those types of acts not resulting from corrupt or malicious motives.") See, also, Mancha v. Field Museum of Natural History, 5 Ill. App. 3d 699,703, 283 N.E. 2d 899, 902 (1st District 1972); Wexell v. Scott, 2 Ill. App. 3d 646, 647, 276 N.E. 2d 735, 736 (3d District 1971); Woodman v. Litchfield Comm. School Dist. No. 12, 102 Ill. App. 2d 330, 334, 242 N.E. 2d 780, 782 (5th District 1968); and Fustin v. Bd. of Ed. of Comm. Unit Dist. No. 2, 101 Ill. App. 2d 113, 121, 242, N.E. 2d 308, 312 (5th District 1968).

[66] Petitioner characterizes as "unrelated," certain cases cited in the Court of Appeals decision (See Pet. 11a), specifically Mills v. County of Winnebago, 104 Ill. App. 2d 366, 244 N.E. 2d 65 (2d District 1969), Arnolt v. City of Highland Park, 52 Ill. 2d 27, 282 N.E. 2d 144 (1972), and Krieger v. Villege of Carpentersville, 8 Ill. App. 3d 243, 289 N.E. 2d 481 (2d District 1972), even though all three cases deal with the question of municipal tort liability. Recognizing the detrimental effect these decisions would have on its argument, Petitioner also refers to them as "early statements" in the "developing body" of Illinois immunity case law. However, the decision in Mills was rendered in 1969, while Arnolt and Krieger were both decided in 1972. (footnote continued on next page)

The most recent Illinois Supreme Court decision construing the Tort Immunity Act is Arnolt v. City of Highland Park, supra. While not precisely on point, that decision strongly suggests that faced with the facts of the instant case, the Illinois Supreme Court would undoubtedly hold a municipality liable. In Arnolt, plaintiff, on the basis of the Tort Immunity Act, sued the City and a policeman for ordinary negligence and for willful and wanton misconduct. The trial court dismissed all parts of the complaint dealing with ordinary negligence, but let stand all claims alleging willful and wanton misconduct. On plaintiff's appeal, defendants did not even challenge those sections of the complaint concerning willful and wanton misconduct, presumably since they recognized that for such conduct it would be unquestionable that liability would lie. The Supreme Court of Illinois did not make even the faintest suggestion that the trial court should have dismissed those portions of the complaint dealing with willful and wanton misconduct. On the contrary, the Court stated:

(footnote 66 continued from previous page)

Petitioner implies that the Court of Appeals relied on Mills, supra, and suggests that a proper reading of that case actually would support its own position. However, the Court of Appeals did not rely on the Mills decision. That case was cited only to demonstrate to the District Court (which had relied on Mills) that the case was no longer good law.

Petitioner implies that the Court of Appeals relied on Krieger, supra, to decide the scope of the Tort Immunity Act. However, Krieger was cited only because that case explicitely recognized that Mills, supra, had been overruled sub silentio by Arnolt, supra. Also, it is noteworthy that the same district that had decided Mills, recognized in Krieger that Mills was no longer good law.

> ... [S]ection 2-202 of the Tort Immunity Act provides immunity where the public employee commits an act or omission while actually "in the execution or enforcement of any law" unless such act or omission constitutes willful and wanton negligence. (emphasis added) Id. at 33, 147.

Respondents can only conclude that Petitioner has blatently and intentionally misstated the relevant Illinois law on immunity to avoid the obviously correct decision on this issue by the Court of Appeals.[67]

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[67] It is interesting to note that on the diversity claims, the County of Cook and all the other County defendants have an equal claim to Tort Immunity Act defenses raised by Petitioner City of Chicago. Nevertheless, these other defendants chose not to seek review from the Court of Appeals decision construing the statute. The conclusion is irresistible that these defendants recognized the frivolous nature of the City's defense to the diversity claims.

CONCLUSION

This Court should deny the Petitions for Writs of Certiorari and thereby decline to review the decision of the Court of Appeals of the Seventh Circuit. The Court of Appeals properly recognized that the vindication of critical Civil Rights by the federal courts leaves no room for labeling the alleged conduct of these State's Attorney Petitioners as "quasi-judicial." The complaints allege that these State's Attorneys planned and executed murders and other wholesale deprivations of Civil Rights by using their "quasi-judicial" office as a license for lawless vigilante activity. The allegations clearly justify the conclusion of the Seventh Circuit that, "the prosecutor certainly may not order subordinates to kill or punish a free citizen without a trial," and then invoke the doctrine of "quasi-judicial" immunity to avoid even the possibility of liability. The only just result is for this Court to concur with the Seventh Circuit in the recognition that, "the State's Attorneys' alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than the activities of police officers allegedly acting under his direction." Vindication of the rights involved necessitates that the trial go forward in the District Court, so that these Petitioners may be promptly tried along with their police officer subordinates.

The complaints also plainly allege that the seven additional police officer Petitioners and two additional State's Attorneys, "joined with Hanrahan and Jalovec and the 14 participating officers in an extensive conspiracy to cause the false arrest and imprisonment of the surviving plaintiffs, the

institution of an unfounded prosecution and concealment of the truth from the public." These allegations, likewise clearly sufficient on their face, can only be resolved by trial in the District Court.

The allegations of the complaints amply fulfill the pleading requirements of the controlling decisions of this Court and sufficient causes of action are set forth as to all Petitioners. Therefore, this Court should leave the decision of the Court of Appeals undisturbed and allow prompt determination of this most serious of Civil Rights damages actions in the District Court.

Respectfully submitted,

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